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No. 07-

IN THE

Supreme Court of the United States

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA,

Petitioner,

v.

VACATION VILLAGE, INC., CEH PROPERTIES, LTD., TIMOTHY S. HEERS, TERRIE HEERS THOMPSON, CHERYL D. NOLTE, GARY R. HEERS, AND CATHLEEN HEERS NORCOTT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID J. J. ROGER
DISTRICT ATTORNEY
E. LEE THOMSON
DEPUTY DISTRICT ATTORNEY
500 South Grand Central Parkway
Fifth Floor
Las Vegas, Nevada 89155
(702) 455-4761

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
PETER R. STEENLAND
BRIAN E. NELSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record
[Additional Counsel on Inside Cover]

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

KIRK B. LENHARD
R. DOUGLAS KURDZIEL
SCOTT M. SCHOENWALD
JONES VARGAS
3773 Howard Hughes Parkway
Third Floor South
Las Vegas, Nevada 89169
(702) 862-3300

LORI POTTER
DANIEL S. REIMER
THOMAS R. DEVINE
ARTHUR P. BERG
KAPLAN KIRSCH &
ROCKWELL LLP
1675 Broadway
Suite 2300
Denver, Colorado 80202
(303) 825-7000

QUESTION PRESENTED

Whether a State's recognition and constitutional protection of an unqualified compensable ownership interest in 500 feet of navigable airspace above a landowner's property is preempted by federal laws that confer on the federal government "exclusive sovereignty" over the navigable airspace of the United States and grant the public the right to traverse navigable airspace less than 500 feet above ground level to ensure safe takeoffs and landings of aircraft.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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Airports Council Int'l, Traffic Statistics, http://www.aci-na.org/asp/traffic.asp?art=215 (last visited Sept. 5, 2007) 8

Clark County Dep't of Aviation, *Comprehensive Annual Financial Report for the Year Ended June 30, 2005* (2005) 8

FAA, Grant Histories (June 12, 2006), *available at* http://www.faa.gov/airports_airtraffic/airports/aip/grant_histories/ 7

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FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning* (2005), *available at* www.faa.gov/about/office_org/headquarters_offices/aep/planning_toolkit/media/III.B.pdf. 21, 22

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PETITION FOR WRIT OF CERTIORARI

Petitioner Clark County, Nevada, the owner and operator of McCarran International Airport ("McCarran"), respectfully seeks a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is available at 2007 WL 2284279 (9th Cir. Aug. 10, 2007) (Pet. App. 1a-25a). The judgment of the United States District Court for the District of Nevada is unreported (Pet. App. 26a-30a).

JURISDICTION

The court of appeals entered its judgment on July 23, 2007. It entered an amended opinion on August 10, 2007. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, Section 2, provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Section 40103(a)(2) of Title 49 of the United States Code provides in part: "[a] citizen of the United States has a public right of transit through the navigable airspace" of the United States, and section 40102(a)(32) provides that "navigable airspace" "includ[es] airspace needed to ensure safety in takeoff and landing of aircraft." These and other relevant laws are reproduced in Pet. App. 64a-65a.

STATEMENT OF THE CASE

It is difficult to overstate the importance of the question of federal preemption presented by this case; indeed, its outcome will have profound consequences for the continued safe and efficient operation of the nation's air transportation system. Though federal law long ago granted the public the right to traverse the navigable airspace, the Ninth Circuit concluded that federal law does not preclude Nevada from recognizing, and protecting under its own constitution, an unqualified ownership interest in navigable airspace needed to ensure safe takeoffs and landings at McCarran, the sixth busiest airport in the country, and other airports in the state. Under the decision below, any state can nullify the public's right under federal law to travel through navigable airspace, regardless of the detrimental impact on air commerce nationwide or the billions of dollars of takings liabilities airport owners will face. Even if no other state follows Nevada's lead, any response petitioner adopts to avoid or mitigate the massive liabilities it now faces will have untoward ripple effects throughout the highly interdependent aviation system.

The Ninth Circuit's decision is all the more remarkable because it represents an extraordinary departure from the time-tested system created decades ago when Congress claimed exclusive sovereignty over the nation's navigable airspace and granted all citizens a right of transit through it. Congress long ago authorized the Federal Aviation Administration ("FAA") to issue regulations defining the "navigable airspace," and to include within that definition

airspace less than 500 feet above ground level that is necessary to ensure safe takeoffs and landings. The FAA, in turn, relies on local governments to enact zoning laws to prevent hazards in this navigable airspace.

At the same time, Congress and the FAA have recognized that public use of navigable airspace can affect the rights of those who own subjacent land. In *United States* v. *Causby*, 328 U.S. 256, 265-66 (1946), and *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), this Court held that low and frequent overflights can cause such direct and immediate interference with the enjoyment and use of underlying land as to constitute a compensable taking. In apparent recognition of these constraints, FAA guidance provides that height restrictions designed to prevent hazards in navigable airspace should not be so low as to take the underlying property. See FAA, Advisory Circular 150/5190-4A, *A Model Zoning Ordinance to Limit Height of Objects Around Airports* § 5.d & app. 1, § IV (Dec. 14, 1987). And to avoid such takings, Congress has authorized local governments to prevent hazards by purchasing land or easements with federal funds. See 49 U.S.C. § 47107(c)(1)(A)(i).

This balance between public ownership of navigable airspace and the rights of subjacent landowners had been established for six decades when the Nevada Supreme Court ruled that landowners possess unqualified ownership of the first 500 feet of airspace above their land—including a right to compensation for its use by the flying public—even when that airspace is part of the publicly-owned, navigable airspace needed to ensure safe takeoffs and landings. *McCarran Int'l Airport* v. *Sisolak*, 137 P.3d 1110 (Nev. 2006), *cert denied*, 127 S. Ct. 1260 (2007). The Nevada court also held that its state constitution affords greater protection against takings than the federal constitution. It held that, under the Nevada constitution, landowners suffer a *per se* taking whenever local zoning ordinances designed to promote aviation safety restrict their use of any navigable airspace less than 500 feet above

ground level, whether or not the restriction would give rise to a taking of the subjacent land under the federal constitution.

In the decision below, the Ninth Circuit concluded that it had no choice but to enforce Nevada's court-created unqualified private ownership interest in the navigable airspace because it understood this Court to have rejected a comparable preemption claim in *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965). Pet. App. at 19a. *Jankovich*, however, in no way compels the erroneous result reached below. Not only did *Jankovich* involve a different statute, it dealt with preemption of a traditional state law property right, namely, a claim that a zoning law deprived a property owner of the use and enjoyment of its land. This case, by contrast, is about private ownership of hundreds of feet of navigable airspace—airspace that is necessary for safe take-offs and landings but is not necessary for landowners to use and enjoy their land or to develop it in economically viable ways—and a zoning law that, in restricting future use of this airspace, causes no cognizable taking under the federal Constitution. In *Causby*, this Court recognized that private ownership of such navigable airspace is an affront to "[c]ommon sense." *Causby*, 328 U.S. at 261.

If left undisturbed, the decision in this case will cause the national aviation system immeasurable harm. Current air traffic levels are already placing serious strains on an antiquated system that is experiencing chronic delays due to lack of adequate landing space. See Del Quentin Wilber, *Overhaul of Air Traffic System Nears Key Step*, Wash. Post, Aug. 27, 2007, at A01. As the sixth busiest airport in the country, McCarran is a critical element in the already overtaxed national aviation system—a system critical to the nation's economy. Petitioner conservatively estimates that if Nevada law is allowed to trump federal law, it faces potential *per se* takings liabilities in the *billions* of dollars. Any response it adopts to avoid or minimize this massive liability will have harmful ripple effects throughout the complex and

interdependent air traffic system, increasing air travel costs to and from Las Vegas and adversely affecting air traffic not only at McCarran, but around the country. The petition should be granted, and the decision below reversed.

A. Federal Regulation Of Navigable Airspace.

Congress has long regulated the nation's aviation system. In 1926, Congress passed the Air Commerce Act ("ACA"), which, *inter alia*, invested the Secretary of Commerce with powers to "[e]stablish air traffic rules for the navigation, protection, and identification of aircraft, including rules as to safe altitudes of flight." Air Commerce Act of 1926, ch. 344, § 3(e), 44 Stat. 568, 570. The ACA also established "a public right of freedom of interstate and foreign air navigation" through "navigable airspace" defined as "airspace above the minimum safe altitudes of flight prescribed by the Secretary of Commerce." *Id.* § 10, 44 Stat. at 574.

In 1938, Congress enacted the Civil Aeronautics Act ("CAA"). Under the CAA, the United States was "declared to possess and exercise complete and exclusive national sovereignty in the air space above the United States." Civil Aeronautics Act of 1938, ch. 601, § 1107(i)(3), 52 Stat. 973, 1028. The United States would continue to have sole control over the "navigable airspace," which was defined as "air space above the minimum altitudes of flight prescribed by regulations issued under this Act," *id.* § 1(24), 52 stat. at 979.

In 1946 Congress passed the Federal Airport Act, ch. 251, 60 Stat. 170 (1946), which was the statute at issue in *Jankovich*. Unlike the ACA and CAA, the Airport Act's primary purpose was not to regulate navigable airspace but to develop an extensive system of airports by partially funding their construction costs. *Id.* § 4, 60 stat. at 171-72. The Airport Act was superseded in 1970 by the Airport and Airway Development Act of 1970, which was superseded by the Airport and Airway Improvement Act of 1982, recodified as amended at 49 U.S.C. § 47101 *et seq*.

In 1958, Congress passed the Federal Aviation Act. The Aviation Act created the FAA and again affirmed that "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1) & historical notes. In addition, the Aviation Act reasserts that Americans have a "public right of transit through the navigable airspace." *Id.* § 40103(a)(2). Under the Aviation Act, navigable airspace is defined as "airspace above the minimum altitudes of flight prescribed by regulations . . . , including airspace needed to ensure safety in the taking off and landing of aircraft." *Id.* § 40102(a)(32) (previously codified as § 40102(a)(30)).

The Aviation Act remains in force today, and requires the FAA to ensure air safety through regulation of the use and scope of navigable airspace. 49 U.S.C. § 40103(b). Pursuant to that delegation, the FAA has established that navigable airspace in uncongested areas begins at an altitude of 500 feet above ground level. 14 C.F.R. § 91.119. However, as mandated by federal statute, navigable airspace begins at lower levels "when necessary for takeoff or landing." *Id.*

Before starting any construction near an airport, a project sponsor must give the FAA notice, whereupon the agency determines whether the construction will pose a hazard to navigable airspace. 49 U.S.C. § 44718; 14 C.F.R. §§ 77.1, 77.11. An object is deemed an obstruction if it exceeds certain absolute height thresholds, or if it would encroach on a defined set of imaginary surfaces that emanate from an airport and its runways. 14 C.F.R. §§ 77.23, 77.25. The FAA may conduct an aeronautical study, including nonadversarial factfinding hearings, to determine if the penetrating structure is a hazard to aviation. *Id.* §§ 77.35, 77.43. The FAA can and often does find that proposed structures are not hazards.

Furthermore, airports, as recipients of federal aviation-related grants, are required by statute to enter into binding grant assurances in which they commit to ensure that airspace is cleared of present and future hazards. 49 U.S.C.

§ 47107(a)(9); 14 C.F.R. § 77.3(a). Airport grant recipients must also commit to adopt "zoning laws . . . to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations." 49 U.S.C. § 47107(a)(10).

In the past 10 years, the FAA issued over $155 million in grants for new runways and related improvements at McCarran in reliance upon such assurances. Virtually every public commercial airport in the country receives such grants and is bound by such assurances.[1] Thus, although the federal government has sovereignty over all navigable airspace, including space below 500 feet where necessary for takeoffs and landings, federal regulation of such airspace relies in substantial part on the efforts of state and local authorities to strike the appropriate balance between safe operation and the protection of property rights in the airport's vicinity.

B. Role Of State And Local Authorities In Protecting Navigable Airspace.

Since 1928, local jurisdictions have enacted ordinances and zoning regulations to restrict the height of structures in order to promote air safety. 2 Kenneth H. Young, *Anderson's American Law of Zoning* § 12.38 (4th ed. 1996). More than half of the States, including Nevada, have authorized their political subdivisions to issue regulations designed to protect airspace near airports. *Id.*; see Nev. Rev. Stat. § 497.040.

To facilitate enactment of suitable local zoning laws and compliance with the grant assurance that reasonable steps be taken to obviate obstacles to navigable airspace, FAA issued *A Model Zoning Ordinance to Limit Height of Objects Around Airports*. FAA, Advisory Circular 150/5190-4A (Dec. 14, 1987). In establishing height restrictions near an airport, the model ordinance employs imaginary surfaces akin

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[1] *See* FAA, Grant Histories (June 12, 2006), *available at* http://www.faa.gov/airports_airtraffic/airports/aip/grant_histories/.

to those set forth in the FAA regulation defining navigable airspace hazards, 14 C.F.R. § 77.25, prohibits construction of structures that would constitute a hazard, and provides that variances should be granted only when accompanied by a FAA determination that the construction would not impede or imperil "the operation of air navigation facilities and the safe, efficient use of navigable airspace." FAA, Advisory Circular 150/5190-4A, app. 1, §§ IV, VII.4. At the same time, the FAA guidance provides that height restrictions "should not be so low at any point as to constitute a taking of property without compensation[]." *Id.* § 5.d. Where height restrictions necessary to protect the navigable airspace will give rise to takings, local governments are expected to purchase easements or land, and Congress has authorized them to use federal funds for this purpose. 49 U.S.C. § 47107(c)(1)(A)(i). Numerous local governments, including Clark County, have adopted zoning ordinances that substantially mirror the FAA Model Ordinance. See, *e.g.*, Clark County Ordinance 1221 (Pet. App. 83a-99a).

C. McCarran Airport And Respondents' Property.

When it was first built, McCarran was far from any substantial property development. It remained relatively isolated for decades, and was able to add additional runways as recently as 1991. Sprawling development, however, eventually encroached upon McCarran. Today the Las Vegas "Strip" borders the airport. Clark County Dep't of Aviation, *Comprehensive Annual Financial Report for the Year Ended June 30, 2005*, at 3 (2005). McCarran is the nation's sixth largest airport in terms of total passengers, handling 46 million travelers in 2006. Airports Council Int'l, Traffic Statistics, http://www.aci-na.org/asp/traffic.asp?art=215 (last visited Sept. 5, 2007).

Petitioner ordinarily seeks to protect the navigable airspace through zoning ordinances. However, where restrictions would result in direct and immediate interference with the enjoyment and use of the land, or significant portions of the

land, petitioner has purchased the underlying property. In the last 20 years, petitioner has spent $23.7 million purchasing 65 acres of land around McCarran and another $16.7 million to acquire other property interests. For example, during this period, petitioner bought a 10-acre shopping center and an adjacent 34 acres of vacant land which were across the street from the airport at the north end of Runways 1L/19R and 1R/19L. A new instrument landing system for these runway approaches rendered this surrounding land unusable for many, though not all, commercial purposes.

Respondents are the former owners of a parcel of land comprising 25 acres that lie along Las Vegas Boulevard and are just over one-half mile southwest of the southern end of Runway 1R, which has had the same southern terminus since 1979. Respondents acquired the property, which was then far removed from any developed part of Las Vegas, in 1964 intending to construct a hotel resort and casino. Pet. App. 4a. A portion of the property was zoned as Rural Estates Residential (R-E), and in 1971 respondents sought to rezone this portion as Limited Resort and Apartment (H-1). *Id.* The County partially conditioned approval of the rezoning request on respondents' grant in August 1971 of an avigation easement, although that easement was never recorded. *Id.* at 4a-5a.

With the rezoning completed, respondents were granted a building permit in January 1972 to begin construction on a 344 hotel resort and casino. In 1974, respondents had completed 90% of the 344-room project when they applied for another variance to increase the size of the construction. That application was placed on hold, but respondents were granted a use permit allowing them to complete the 344-room hotel and a 12,000-square foot slot machine arcade. Nonetheless, respondents did not complete the rooms or build the arcade at that time.

In June 1988, respondents filed a request to have the R-E property reclassified as H-1. Pet. App. 5a. The County like-

wise conditioned approval of this request on respondents' grant of a perpetual avigation easement authorizing flights over the property. Respondents granted the easement and the County reclassified the property from R-E to H-1 and granted a use permit for construction and maintenance of a 501-room, two-story hotel, and an 85,000-square-foot casino. *Id.* at 5a-6a. In 1989, respondents continued the construction they had begun back in 1974. *Id.* at 6a.

Several zoning ordinances govern the height of structures on the property. In February 1981, the County enacted Ordinance 728 dealing with structures adjacent to public use airports. Pet. App. 67a-83a. Ordinance 728 set a height limitation demarcated by a plane sloping "twenty (20) feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface" for areas designated as a "Utility Runway Visual Approach Zone." *Id.* at 76a. Ordinance 728 set a height limitation of 150 feet above the airport elevation for areas within a "Horizontal Zone." *Id.* at 79a.

Of particular importance to this petition, the County adopted Ordinance 1221 in 1990 to ensure the safe takeoff and landing of aircraft into McCarran. Under the ordinance, for property in a "Precision Instrument Runway Approach Zone" the applicable height limitation "[s]lopes fifty feet outward for each foot upward beginning at the end of and at the same elevation as the primary surface and extending to a horizontal distance of ten thousand feet along the extended runway centerline." This height limitation creates a "50:1" approach zone. If developers want to build higher, they can seek a "no hazard" determination from FAA and a variance from the County. Pet. App. 6a-7a; *id.* at 91a.

The County also adopted Ordinance 1198, which establishes an "'airport environs overlay district.'" The purpose of Ordinance 1198 is "'to provide for a range of uses compatible with airport accident hazard and noise exposure areas and to prohibit the development of incompatible uses

that are detrimental to the public health, safety and welfare in these airport environs.'" As applied, Ordinance 1198 designates 1.25 acres of respondents' property as a runway protection zone. Pet. App. 7a.

On January 16, 1990, the FAA issued a "Determination of Hazard to Air Navigation" to respondents. The FAA determined that respondents' previously proposed 80-foot sign, 47-foot casino and three 76-foot hotel buildings would penetrate the approach slope for proposed Runway 1R and thus "'would have a substantial adverse impact to the safe and efficient use of navigable airspace and would be a hazard to air navigation.'" Respondents redesigned the proposed construction, limiting the height of the structures to 38 feet above ground level 2,850 feet southwest of the approach end of Runway 1R. On June 27, 1990, the FAA issued a "Determination of No Hazard to Air Navigation" finding that "'[a]lthough the structure has been identified as an obstruction, . . . the proposal would not adversely affect the safe and efficient use of navigable airspace and would not be a hazard to air navigation.'" Pet. App. 6a. Respondents thereafter completed a 315-room, two-story hotel-casino on the property. Though respondents eventually went into bankruptcy, this and adjacent land is currently being developed for 1.5 million square feet of mixed commercial uses with FAA- and County-approved structures. See Hubble Smith, *Hip To Be Square*, Las Vegas Rev. J., May 20, 2007. The developers of this new project have secured financial backing of hundreds of millions of dollars. *Id.*

D. Proceedings And Rulings Below.

In 1993, respondents brought an inverse condemnation of airspace and inverse condemnation of land complaint against the County in Nevada state court. Pet. App. 7a. They argued that, under Article 1, Section 8(6) of the Nevada constitution, the County had inversely condemned their airspace by virtue of Ordinance 1221. Second, respondents argued that

Ordinance 1198 condemned 1.25 acres of their land located in the runway protection zone. *Id.*

In 1997—before trial began—respondent CEH filed a voluntary petition for bankruptcy under Chapter 11 in the United States Bankruptcy Court for the District of Nevada. The inverse condemnation claims were listed as contingent and unliquidated claims as part of respondent's reorganization plan. The next year, respondents removed their inverse condemnation action to the bankruptcy court. Pet. App. 7a-8a.

Following a bench trial, the bankruptcy court concluded that Ordinance 1221 effected a taking of respondents' airspace and awarded them a total of $9,593,940 in damages, fees, and prejudgment interest "for the taking of airspace between the 20:1 approach granted in the 1988 avigation easement and the lower 50:1 precision instrument approach path instituted after the airport expansion."[2] Pet. App. 26a-27a, 28a. The bankruptcy court denied any award under Ordinance 1198 for a taking of respondents' 1.25 acres in the runway protection zone. *Id.* at. 27a. The County appealed and respondents cross-appealed.

While these appeals were pending, a divided Nevada Supreme Court ruled that, under federal and state law, Nevadans own the first 500 feet of airspace above their land. *Sisolak*, 137 P.3d at 1120. The Nevada court concluded that Ordinance 1221 (along with another ordinance not at issue here) caused a *per se* taking of the subject property under both the federal and state constitutions. *Id.* at 1120-26. The majority acknowledged, however, that it was "not unreasonable" to conclude, as the dissenting justices had, that the ordinances were appropriately analyzed under *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), and thus did not effect a *per se* taking under federal

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[2] The court also granted an award of $528,490 for the taking of ground easements. Pet. App. 28a. The merits of this portion of its decision was not appealed and is not relevant to this petition.

takings law. *Sisolak*, 137 P.3d at 1126. Accordingly, the majority grounded its *per se* takings ruling on the Nevada Constitution, which it concluded was more expansive in its protection of property rights than the federal Takings Clause.

In the decision below, the Ninth Circuit held that, for purposes of federal takings law, Ordinance 1221 is properly analyzed under *Penn Central*'s balancing test and that, under that framework, the ordinance did not cause any compensable deprivation of property. Pet. App. 18a. The court recognized, however, that the Nevada Supreme Court "found that the Nevada Constitution defines takings more broadly than the United States Constitution and that Ordinance 1221 is a *per se* regulatory taking under the Nevada Constitution." *Id.* at 19a (emphasis added). Accordingly, the court had to address petitioner's argument that federal law preempts "*Sisolak*'s application of the Nevada Constitution's takings clause with respect to Ordinance 1221." *Id.*

The Ninth Circuit concluded (Pet. App. 20a) that federal law lacks such preemptive force, based on its view that this Court had rejected a "substantially similar" preemption argument in *Jankovich*, 379 U.S. at 493-95. In *Jankovich*, this Court granted review of an Indiana Supreme Court decision invalidating an airport zoning restriction as an impermissible taking under federal and state law. The *Jankovich* petitioners argued that the state ground of decision was not adequate to sustain the decision because it was "inconsistent with the policy of the Federal Airport Act." *Id.* at 492. This Court rejected that argument, however, and dismissed the writ as improvidently granted, concluding that the Indiana decision did "not portend the wholesale invalidation of all airport zoning laws" and was "compatible with the congressional policy embodied in the Federal Airport Act." *Id.* at 493, 495. In the decision below, the Ninth Circuit deemed these statements "[r]elevant to the present case," and ruled that "the Supremacy Clause does not invalidate the decision of the Nevada Supreme Court finding

that height restrictions in airport zoning ordinances amount to a taking of the underlying property requiring compensation under the Nevada Constitution." Pet. App. 20a. Because the district court had not based its award on *Sisolak*'s grant of a property interest "in the usable airspace above [their] property up to 500 feet," the court of appeals remanded for a determination of just compensation in light of *Sisolak*.

REASONS FOR GRANTING THE PETITION

The question of federal preemption decided by the Ninth Circuit has grave implications for the nation's air transport system. By granting the public a right of transit through navigable airspace needed to take off and land safely at airports, Congress plainly preempted states from recognizing and protecting compensable private ownership rights in such airspace, except where necessary to prevent a taking of the subjacent land itself. The Ninth Circuit's failure to recognize the preemptive force of federal law upsets the careful and time-tested balance Congress has struck between protecting the flying public and the rights of private landowners. Under the decision below, other states can recognize and protect similar property rights, with catastrophic effects for the national aviation system as a whole. And even if no other state follows Nevada's example, the decision below exposes petitioner to massive state takings liabilities for enacting an ordinance that (a) seeks to prevent hazards in navigable airspace that belongs to the public at large and (b) causes no federally cognizable taking of private property. Any efforts the County takes to avoid or minimize this massive expense will have significant and deleterious ripple effects on the efficiency and safety of the complex and highly inter-dependent national aviation system.

Nothing in this Court's decision in *Jankovich* compels these untoward harms. *Jankovich* decided only that a different statute did not preempt a state takings claim that was indistinguishable from, and in fact based upon, a federally

cognizable takings claim—*i.e.*, that a zoning height restriction so interfered with use and enjoyment of land that it caused a compensable taking of the land itself. *Jankovich* in no way suggests that Congress's decision to place this airspace in the public domain can coexist with an extraordinary state law-based right to compensation for public use of navigable airspace that causes no federally cognizable deprivation of the underlying land. Federal law therefore forecloses recognition of the state law ownership right for which respondents were compensated in this case.

The need for this Court's intervention, moreover, is underscored by the fact that the decision below is at odds with the disposition of similar preemption claims by other courts of appeals and with the position the United States has taken in other litigation involving claims to private ownership of the navigable airspace. The Court should grant the petition, reverse the decision below and thereby protect the critical national interests implicated by the erroneous ruling below.

THE PREEMPTIVE EFFECT OF FEDERAL LAW ON STATE CONSTITUTIONAL PROTECTIONS OF UNQUALIFIED OWNERSHIP INTERESTS IN THE NAVIGABLE AIRSPACE IS A VITALLY IMPORTANT QUESTION OF FEDERAL LAW.

A. Federal Law Precludes States From Recognizing, And Protecting Under Their Own Constitutions, Unqualified Ownership Interests In Navigable Airspace.

In 1958, Congress recognized the need for unified control of aircraft flight, both civilian and military, following a number of air crashes. See John W. Gelder, Comment, *Air Law: The Federal Aviation Act of 1958*, 57 Mich. L. Rev. 1214, 1214-15 (1959). That year, Congress passed the Aviation Act to promote and develop air safety through the uniform regulation of the nation's airspace. Building on the

common right of passage on navigable waters, the Aviation Act not only gave the United States "exclusive sovereignty" over the nation's airspace, but also granted all citizens a "public right of transit" through that same space. 49 U.S.C. § 40103(a). The Aviation Act authorizes the FAA to define the "navigable airspace," including any "airspace needed to ensure safety in the takeoff and landing of aircraft." *Id.* § 40102(a)(32).

Pursuant to this mandate, the FAA has established that navigable airspace in uncongested areas begins at an altitude of 500 feet above ground level, but includes lower altitudes when "necessary for takeoff and landing." 14 C.F.R. § 91.119. The FAA defines navigable airspace below 500 feet in a flexible and context-specific fashion. It requires notice of proposed construction that could affect "safety in air commerce" or "the efficient use and preservation of the navigable airspace and of airport traffic capacity at public-use airports." 49 U.S.C. § 44718(a). Upon receipt of such notice, the FAA evaluates a proposal and decides whether it will create a hazard to air traffic. See generally 14 C.F.R. pt. 77. Although these determinations do not compel any particular action by local zoning boards, see, *e.g.*, *Aircraft Owners & Pilots Ass'n* v. *FAA*, 600 F.2d 965, 966-67 (D.C. Cir. 1979), they determine whether a structure will invade the "navigable airspace." See 14 C.F.R. § 91.119 & pt. 77, subpt. C.

At the same time that federal law defines, and confers an absolute right of transit through, the navigable airspace, it seeks to avoid takings of any subjacent land. Such takings can occur from overflights that "are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land." *Causby*, 328 U.S. at 265-66. See also *Griggs*, 369 U.S. at 88-90 (overflights that rendered house uninhabitable effected a taking). Similarly, zoning laws designed to prevent aviation hazards can themselves be so onerous as to effect takings of underlying property, if, for example, they "completely deprive an owner of '*all*

economically beneficial us[e]' of her property," *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (alterations in original) (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)), or are found, under *Penn Central*'s balancing test, unreasonably to destroy legitimate investment-backed expectations.

To minimize any takings of underlying land, therefore, the Aviation Act states that zoning laws should be used to protect the navigable airspace "to the extent reasonable." 49 U.S.C. § 47107(a)(10). The FAA's model zoning guidance, in turn, provides that height restrictions "should not be so low at any point as to constitute a taking of property without compensation[]." FAA, Advisory Circular 150/5190-4A, § 5.d. Moreover, Congress has authorized use of federal funds to purchase land or easements when necessary to prevent aviation hazards. 49 U.S.C. § 47107(c)(1)(A)(i).[3]

This scheme makes unmistakably clear that Congress intended to bar private ownership of navigable airspace, except insofar as necessary to prevent an uncompensated taking of subjacent land. In this case, however, respondents did not show that Ordinance 1221 caused a deprivation of their underlying land. Having built a casino and hotel on the land, respondents obviously could not show that the

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[3] In 2006, the federal government distributed approximately $3.4 billion dollars in money for airport improvement throughout the *entire country*. See FAA, Grant Histories (Aug. 29, 2007), *available at* http://www.faa.gov/airports_airtraffic/airports/aip/grant_histories/. However, over the last ten years, Clark County has received only $155 million of the federal money available for airport improvement. Moreover, the lion's share of this $155 million was designated for improving the runways at McCarran and other airport facilities, not the purchase of property interests surrounding the airport. Even assuming, however, that all federal monies McCarran receives could be used for this purpose, these funds would be in no way sufficient to offset the billions of dollars at stake here. Indeed, the federal government will be *less* likely to devote any of its limited resources to improving McCarran airport or other Nevada airports in the face of the uncertainty created by the decision below.

ordinance deprived them of all beneficial uses of the property. For these same reasons, respondents could not show that Ordinance 1221 caused a taking under *Penn Central*, as the Ninth Circuit correctly ruled. Instead, respondents were compensated solely for the loss of their state law right to exclude the public from navigable airspace.

The Aviation Act and FAA regulations plainly preempt this state recognition and protection of unqualified private ownership interests in hundreds of feet of navigable airspace. Although state law ordinarily defines the property rights that can give rise to takings claims, the right that Nevada law purports to give landowners to exclude the public from navigable airspace is completely inconsistent with federal law and regulations that place this same airspace in the public domain so that the public may pass through it. Moreover, preemption of this state law right did not give rise to any compensable taking under the federal constitution, because public access to such airspace does not deprive respondents of the use and enjoyment of their land. States may generally afford greater constitutional protection to property rights than the federal constitution does. But a state constitutional right to compensation for public use of navigable airspace that causes no federally cognizable deprivation of the underlying land is inconsistent with Congress's decision to allow the public to traverse this airspace. Such a state constitutional right is thus preempted no less than any other kind of state law. See *Gregory* v. *Ashcroft*, 501 U.S. 452, 455 (1991) (considering whether Missouri constitutional provision for mandatory state judge retirement violated federal Age Discrimination in Employment Act of 1967).

It is simply impossible to reconcile Nevada's recognition and protection of an unqualified ownership interest in navigable airspace needed for safe takeoffs and landings with the Aviation Act and its implementing regulations.

Accordingly, federal law necessarily preempts Nevada's inconsistent property laws.[4]

B. Recognition Under State Law Of Private Ownership Of Navigable Airspace Has Deeply Detrimental Implications For The National Air Transportation System.

It is difficult to overstate the adverse consequences of the Ninth Circuit's conclusion that federal law does not preempt state recognition and protection of private ownership of the navigable airspace. Under the decision below, other states can also grant such ownership rights. *Cf. Southern Pac. Co.* v. *Arizona ex rel Sullivan*, 325 U.S. 761, 775 (1945) (appropriate to consider the cumulative effects of other state attempts to regulate interstate transportation). If they do so, it would "clog" the "public highway[s]" of navigable airspace, "seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." *Causby*, 328 U.S. at 261.

But even if no other states follow Nevada's lead, the Ninth Circuit's ruling will still have impacts outside Nevada. The County conservatively estimates that the cost of purchasing the navigable airspace below 500 feet around McCarran could exceed $10 *billion*. Any response to this staggering potential liability would have untoward effects on a host of users and beneficiaries of the national air transportation system.

Even assuming that repeal of Ordinance 1221 would enable the County to avoid future takings liabilities,[5] such a response

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[4] Though this petition addresses the ramifications on McCarran of Nevada's unqualified interest in 500 feet of navigable airspace, other Nevada airports may be similarly affected, including the state's military airports such as Nellis Air Force Base.

[5] Because the *Sisolak* court affirmed a judgment measuring damages from the effective date of Ordinance 1221, it is not clear whether *Sisolak*

would allow landowners to build structures approaching the height of the Washington Monument immediately next to the airport. The construction of just one such building in the glide path of either set of McCarran's runways would effectively close the nation's sixth busiest airport to commercial aircraft.[6] Such a closure would in turn force a re-distribution of air traffic across the country. Repeal of Ordinance 1221 and others like it would thus leave continued operation of a major domestic and international airport at the mercy of private developers.

On the other hand, it is not at all clear that the County could raise the enormous amount of money necessary to purchase all of the "privately-owned" navigable airspace required for McCarran's current operations. And, even if it could pay for all such airspace, doing so would entail equally unacceptable consequences. To cover the estimated $10 billion cost of such airspace, McCarran's landing fees would have to be raised by the equivalent of $43 per passenger.[7] Such a huge increase would make McCarran's landings fees 70% higher than the most expensive landing fees in the nation.

This increase would have a major impact on the airport, the region it serves, and the national air transportation system as a whole. Even if increased fees did not cause a decline in passengers, the huge expense of purchasing that airspace would prevent the County from building Ivanpah, a new

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would permit claims that landowners suffered *per se* takings from the Ordinance's effective date until its date of repeal.

[6] If planes cannot descend below 500 feet until they are over airport grounds, the FAA-prescribed glide angle would force them to land so far down McCarran's runways that commercial aircraft could not stop safely. Due to cross-winds, moreover, McCarran must have both sets of runways available in order to support regularly scheduled commercial service.

[7] Federal grant assurances require airports to be as "self-sustaining as possible," which compels airports to look to airport resources to make up budget shortfalls. 49 U.S.C. § 47107(a)(13)(A). As a result, virtually all airport costs are borne by airport users in one form or another.

supplemental airport 45 miles from Las Vegas that is projected to open in 2017. McCarran itself is expected to reach full capacity as early as 2012. Without Ivanpah, the County cannot meet future passenger demand. And, because airports operating at peak capacity inevitably spawn delays, petitioner's inability to build Ivanpah will burden travelers to and from Las Vegas in future years, and add further strains on the highly complex and interdependent air traffic system. See FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning*, V-1 (2005), *available at* www.faa.gov/about/office_org/headquarters_offices/aep/planning_toolkit/media/III.B.pdf. ("what happens at an individual airport may affect other airports within the system"); *American Airlines, Inc.* v. *Town of Hempstead*, 272 F. Supp. 226, 233 (E.D.N.Y. 1967) ("Every . . . take-off and landing is a moving part in a vast complex of regional aircraft traffic control"), *aff'd*, 398 F.2d 369 (2d Cir. 1968).

To mitigate these problems, the County may be forced to purchase less than all of the navigable airspace needed to maintain current operations. For example, the County might choose not to purchase certain navigable airspace necessary to ensure the safe departure of aircraft capable of flying to international destinations. This could allow the County to avoid a meaningful portion of the overall liability that *Sisolak*'s un-preempted *per se* takings rule will otherwise impose. But the takings "savings" would come at significant operational costs, at McCarran and elsewhere.

Without this navigable airspace, many types of planes used to provide service to Las Vegas would be unable to take off fully loaded with all of the fuel necessary to make certain long-distance flights, especially in the hotter summer months. If airlines cannot operate such long-distance flights safely or economically out of McCarran, more long-distance travelers would have to switch planes elsewhere in order to reach the city. This would have ripple effects in hubs where Las Vegas-bound or -returning passengers would have to change

planes, and where more flights would be necessary to meet passenger demand to and from Las Vegas. It would also exacerbate congestion at McCarran, as more flights would be needed to carry the number of passengers that currently arrive and depart via fully-loaded aircraft. This, in turn, has implications for the federal government's management and operation of the complex Air Traffic Control system and for airlines and customers at affected hubs. Finally, it would undermine the significant federal investment ($155 million over the past 10 years) made to expand McCarran's capacity in terms of numbers and size of aircraft. *Cf. United States* v. *Little Lake Misere Land Co.*, 412 U.S. 580, 597 (1973) (rejecting "state abrogation" of federal statutory programs because "[c]ertainty and finality are indispensable . . . when, as here, the federal officials carrying out the mandate of Congress irrevocably to commit scarce funds").

In short, because the only court of appeals with jurisdiction to decide the issue has now concluded that federal law does not preempt Nevada's recognition of unqualified private ownership rights in the navigable airspace, the resulting massive takings liability on a major national airport will inescapably and severely undermine the fundamental goals of the Aviation Act, which seeks to maintain the highest degree of safety in air travel, and to promote "the availability of a variety of adequate, economic, efficient, and low-priced services." 49 U.S.C. § 40101(a)(4). The reality is that "[l]ocal planning for airport growth cannot be accomplished without consideration of national, state and regional needs." FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning*, V-1. Recognition of private ownership of the navigable airspace outside McCarran will place an enormous strain on one of the largest components in this highly complex and interdependent system, and that strain will inescapably burden this vital network as a whole—through sharply increased costs, severely reduced capacity, increased congestion, or (most likely) some combination of

these problems. This Court should therefore grant the petition to forestall these deleterious impacts.

C. The Decision In *Jankovich* Did Not Compel The Ninth Circuit To Enforce State Property Laws That Will Inflict Such Significant Harms On The Nation's Aviation System.

This Court's decision in *Jankovich* v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1965), did not address the preemption issue raised in this case or one "substantially similar" to it, and thus did not compel the Ninth Circuit to enforce state legal rules that will inflict such serious harms on the nation's aviation system. To the contrary, *Jankovich* involved an entirely different type of takings claim and, more importantly, a different statute. The lower court's reliance on *Jankovich*, therefore, was entirely misplaced.

Jankovich involved a local ordinance that imposed an 18-foot height limit on toll road property, thereby barring operation of a toll road. *Id.* at 488. After this Court granted review of a state court decision invalidating the ordinance as a taking under both federal and state law, the property owner argued that this Court lacked jurisdiction because the state-law takings ruling was an independent and adequate basis for the decision. In response, the airport operators argued that the state law ruling could not sustain the decision because it was inconsistent with federal law. They argued that the state court had made broad pronouncements that "signif[ied] the total nullification of airport zoning," and that such state-law nullification of airport zoning was preempted by "the policy of the Federal Airport Act," which deemed local airport zoning "essential to assur[ing] compatible land use" near airports. *Id.* at 492-93 (summarizing airport operators' argument).

This Court deemed this preemption claim "insubstantial" because its premise—that the Indiana Supreme Court's opinion signaled state nullification of zoning law—was

"unfounded." *Id.* at 492-93 & n.2. The Indiana court had "recognized that zoning regulations may be upheld as a reasonable exercise of the police power where the owner of property is merely restricted in the use and enjoyment of his property," but it found a taking in the case before it "because the City of Gary has attempted, by passage of the ordinance under consideration, to take and appropriate to its own use *the ordinarily usable* air space of property adjacent to the Gary Airport." *Id.* at 493 (internal quotation marks omitted). Such a ruling, this Court concluded, did "not portend the wholesale invalidation of all airport zoning laws." *Id.*

In dismissing the preemption claim advanced by the airport operators in *Jankovich*, this Court plainly did not address a claim "substantially similar" to the one raised here. Pet. App. 20a. First, the *Jankovich* property owner asserted a traditional takings claim—*i.e.*, that a zoning restriction deprived it of the use of its land. In resolving that claim, the Indiana Supreme Court expressly relied on *Causby* and *Griggs* for the proposition that "the *reasonable and ordinary use* of air space above land is a property right which cannot be taken without payment of compensation." *Indiana Toll Road Comm'n* v. *Jankovich*, 193 N.E.2d 237, 240 (Ind. 1963) (emphasis added). *Causby* and *Griggs*, in turn, both tied compensation for the loss of superadjacent airspace to situations in which that loss affected the use and enjoyment of the underlying land. As the Court explained in *Griggs*:

> [T]he use of land presupposes the use of some of the airspace above it. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected. An invasion of "the superadjacent airspace" will often "affect *the use of the surface of the land itself.*"

369 U.S. at 89 (citation omitted) (citing and quoting *Causby*, 328 U.S. at 264-65; emphasis added). See also *Causby*, 328 U.S. at 264 (concluding that the overflights in that case caused "as much an appropriation of the use *of the land* as a more conventional entry upon it") (emphasis added).

Here, respondents were not compensated for loss of the use of the "reasonable and ordinary" airspace necessary to enjoy and use their property, upon which they built a 315-room hotel and casino. They were compensated for loss of a state law right to exclusive ownership of all navigable airspace up to 500 feet above their land. *Jankovich* did not address whether federal law preempted such an extraordinary state law right.

Second, *Jankovich* involved an entirely different statute—the Airport Act. This Court has made clear that the question of preemption is "at bottom, . . . *one of statutory intent, and we accordingly begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purposes.*" *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (internal quotation marks omitted) (emphasis added). Accordingly, it is not possible to make any sound conclusions about the preemptive effect of one statute—namely, about what its language means or what Congress's intent was—by looking at the language and history of another statute.

In fact, the Airport Act is fundamentally different from the Aviation Act. Congress enacted the Airport Act to fund part of the costs of constructing new airports. Ch. 251, § 4, 60 Stat. at 171-72. That Act did not define the navigable airspace, confirm its place in the public domain or grant the public a right of transit through such airspace. Instead, the *Jankovich* petitioners could glean from the Airport Act only a determination that "airport zoning is essential to assure compatible land use in the vicinity of airports without prohibitive cost." 379 U.S. at 493. No serious claim could be advanced that, by making that determination, Congress intended to preclude state courts from recognizing, under their state constitutions, a right to compensation for a land-impairing loss of airspace that was, in all material respects, identical to the right to compensation recognized in *Causby*

and *Griggs*. Indeed, as explained above, even the Aviation Act does not purport to preempt such state law rights.

The Aviation Act and its implementing regulations, however, necessarily *do* preempt state-law recognition and protection of an unqualified right to exclude the public from up to 500 feet of navigable airspace needed to ensure safe takeoffs and landings. By placing this same airspace in the public domain and giving the public a right to pass through it, it is clear that "Congress intended to preclude such an application of state law," *Jankovich*, 379 U.S. at 494, where, as here, public use of the airspace causes no federally cognizable taking of the underlying land. The Ninth Circuit's contrary ruling is plainly incorrect, and should be reversed to forestall the extraordinary and untoward consequences that Nevada's expansive definition and protection of property rights will have on McCarran and the national aviation system as a whole.

D. The Decision Below Is At Odds With The Rulings Of Other Courts And The Position Of The Federal Government.

The grave implications of the Ninth Circuit's erroneous preemption ruling involve matters of such urgent national importance that further review by this Court is plainly warranted. But review is also warranted because the decision below is at odds with lower court decisions addressing similar preemption issues and with the position of the federal government in cases involving the public's right to use the navigable airspace. Although these decisions and government pronouncements may not reflect the type of "square" conflict in the circuits that inexorably leads to review by this Court, they confirm that cases involving claims of private ownership of the navigable airspace are recurring, that the Ninth Circuit's view of preemption is insupportable, and that other courts and the federal government have consistently recognized the preeminence of federal law in defining, regulating and ensuring public access to navigable airspace.

First, the Federal Circuit has recognized that "[p]rivate property interests simply do not, as a general matter, exist in the navigable airspace of the United States." *Air Pegasus of D.C., Inc.* v. *United States*, 424 F.3d 1206, 1219 (Fed. Cir. 2005). Accordingly, the Federal Circuit held that the plaintiff had no cognizable property interest because "it is well established under federal law that the navigable airspace is public property not subject to private ownership." *Id.* at 1217. Other courts have likewise concluded that federal law precludes recognition of a state-law property right in navigable airspace. See, *e.g.*, *City of Austin* v. *Travis County Landfill Co.*, 73 S.W.3d 234, 242 (Tex. 2002) (rejecting takings claim based on invasions of airspace above property on the ground that a landowner "has no right to exclude overflights above its property, because airspace is part of the public domain").

The Ninth Circuit, by contrast, has concluded that, while the Aviation Act places navigable airspace in the public domain, it does not preclude states from subjecting that same airspace to private ownership, even where such ownership is not necessary to ensure use and enjoyment of the underlying land. To be sure, *Air Pegasus* and *City of Austin* did not address this Court's decision in *Jankovich*, and thus cannot be said to conflict squarely with the decision below. Nevertheless, the logic of the Ninth Circuit's ruling in this case would suggest that these holdings were wrong.

The decision below is also at odds with the Second Circuit's decision in *United States* v. *City of New Haven*, 496 F.2d 452, 454 (2d Cir. 1974), and the Seventh Circuit's decision in *Vorhees* v. *Naper Aero Club, Inc.*, 272 F.3d 398 (7th Cir. 2001). In *City of New Haven*, East Haven sued to enjoin New Haven from implementing a runway extension because New Haven had failed to obtain the necessary authorization under state law to purchase land in East Haven for a runway "clear zone." The Connecticut courts agreed with East Haven and enjoined the runway plan, whether it

took "'the form of physical expansion or the mere maintenance of clear zones over property located in East Haven.'" 496 F.2d at 453.

The United States subsequently brought suit in federal court, claiming that the state law injunction was preempted. The district court agreed, and the Second Circuit affirmed. The court of appeals explained that "the airspace above the East Haven land acquired by New Haven" was "part of the navigable airspace." *Id.* at 454. Noting that state legislation that purported "'to deny access to navigable air space would . . . constitute a forbidden exertion of the power which the federal government has asserted,'" the Second Circuit concluded that "East Haven cannot enforce its rights under Connecticut law by obtaining a state court injunction which infringes on federal regulation of navigable airspace." *Id.*

In this case, there is no injunction barring access to the navigable airspace. But a state law right to exclude the public from such airspace unless billions of dollars in damages are paid effectively bars such access. Indeed, as petitioner has explained, the massive liability it faces from numerous lawsuits like respondents' creates hydraulic pressure to concede the navigable airspace to the subjacent landowner.

Similarly, *Vorhees* involved a claim that overflights gave rise to a trespass under state law, entitling the property owner to an injunction. The suit had been removed from state court, and under the "well-pleaded" complaint rule, could be adjudicated in federal court only if federal aviation laws involved the type of "complete preemption" that makes it impossible to frame any state-law claim. 272 F.3d at 402. The Seventh Circuit concluded that the Aviation Act was not one of the rare statutes, like the Employee Retirement Income Security Act or § 301 of the Labor Management and Relations Act, that effect such "complete preemption." *Id.* at 403. Nevertheless, it made clear that the trespass claim was certainly preempted as a matter of conflict preemption principles, *id.*, and that it would therefore "be difficult at best

to convince a state court that the claim about trespass to airspace . . . would not interfere with the federal regulatory apparatus." *Id.* at 405. Although these statements are dicta, they reflect yet another circuit's recognition that federal law necessarily preempts state laws that purport to give private parties the right to exclude the public from the federally defined navigable airspace.

Finally, the United States has consistently maintained that federal law precludes private ownership of the navigable airspace, unless the public's use of that airspace—or zoning laws designed to prevent aviation hazards—effect a federal taking of the subjacent land. Thus, in *Air Pegasus*, the government argued that navigable airspace is "not available for private ownership." 424 F.3d at 1214 (noting government's position). More recently, the government argued in a First Circuit case that, absent some pre-existing use of airspace, ownership of land "never include[s] the right to exclude the public from the navigable airspace above [the] land." See Opp. of United States at 13, *Breneman* v. *United States*, 381 F.3d 33 (1st Cir. 2004), *available at* 2003 WL 23899334.

As Justice Jackson eloquently observed over 60 years ago:

> the landowner no more possesses a vertical control of all the air above him than a shore owner possesses horizontal control of all the sea before him. The air is too precious as an open highway to permit it to be "owned" to the exclusion or embarrassment of air navigation by surface landlords who could put it to little real use.
>
> Students of our legal evolution know how this Court interpreted the commerce clause of the Constitution to lift navigable waters of the United States out of local controls and into the domain of federal control. Air as an element in which to navigate is even more inevitably federalized by the commerce clause than is navigable

> water. Local exactions and barriers to free transit in the air would neutralize its indifference to space and its conquest of time.

Northwest Airlines v. *Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) (citation omitted).

In *Causby* and *Griggs*, this Court acted in the absence of lower court divisions[8] to address fundamentally important questions that the advent of modern aviation posed for the rights of owners of land beneath navigable airspace. In the ensuing decades, Congress, the FAA and local authorities have faithfully adhered to the decisions of the Court in those cases, defining and regulating the navigable airspace, using local zoning to protect safety in that airspace and purchasing land and easements (or paying takings damages) when the demands of aviation safety interfere with the use and enjoyment of underlying land. Because the decision below completely undermines the balance struck in those decisions, the Court must act now to restore the careful equilibrium of public and private interests that are essential to a safe and efficient national aviation system, and that federal law mandates.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[8] *See Causby*, 328 U.S. at 258 (noting that writ of certiorari was granted "because of the importance of the question presented"); *Griggs*, 369 U.S. at 84 (review granted because the lower court's decision "seemed to be in conflict with *United States* v. *Causby*").

Respectfully submitted,

DAVID J. J. ROGER
DISTRICT ATTORNEY
E. LEE THOMSON
DEPUTY DISTRICT ATTORNEY
500 South Grand Central Parkway
Fifth Floor
Las Vegas, Nevada 89155
(702) 455-4761

CARTER G. PHILLIPS*
JOSEPH R. GUERRA
PETER R. STEENLAND
BRIAN E. NELSON
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

KIRK B. LENHARD
R. DOUGLAS KURDZIEL
SCOTT M. SCHOENWALD
JONES VARGAS
3773 Howard Hughes Parkway
Third Floor South
Las Vegas, Nevada 89169
(702) 862-3300

LORI POTTER
DANIEL S. REIMER
THOMAS R. DEVINE
ARTHUR P. BERG
KAPLAN KIRSCH &
ROCKWELL LLP
1675 Broadway,
Suite 2300
Denver, Colorado 80202
(303) 825-7000

Counsel for Petitioners

* Counsel of Record

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